(3) (2)

Nos. 00-1770 / 00-1781

Supreme Court, U.S.
FILED
JUL 23 2001
CLERK

In The

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

and

OAKLAND HOUSING AUTHORITY and HAROLD DAVIS,

v.

Petitioners,

PEARLIE RUCKER, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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42 U.S.C. section 1437d(*l*)(6) ..... *passim*

OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondents Pearlie Rucker, Herman Walker, Willie Lee and Barbara Hill (collectively "Respondents") respectfully oppose the petitions for writ of certiorari filed by the United States Department of Housing and Urban Development ("HUD") and the Oakland Housing Authority ("OHA") (collectively "Petitioners") in this consolidated memorandum.

I. PETITIONERS FAIL TO ESTABLISH A BASIS FOR CERTIORARI

A. No Inter-Circuit Or State Court Conflict Exists.

As an initial matter, petitioners fail to establish the conflict between decisions contemplated under Supreme Court Rule 10 for a grant of certiorari. No other United States court of appeals has construed section 1437d(*l*)(6) or otherwise considered the issues presented in *Rucker*. Consequently, the Ninth Circuit's opinion raises no inter-circuit conflict necessary to support review by this Court.

Petitioners' reliance on two state supreme court decisions is misplaced. Petitioners offer the state court decisions in *Memphis Housing Authority v. Thompson*, 38 S.W.3d 504 (Tenn. 2001) (*"Thompson"*) and *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700 (Minn. 1999) (*"Lor"*) as evidence of a conflict meriting certiorari. A review of these decisions demonstrates that neither case presents a substantive conflict with *Rucker* warranting review by this Court.

The holding in *Thompson* is in fact entirely consistent with *Rucker*. In *Thompson*, the housing authority invoked HUD's "one strike" lease provision to evict a tenant for the drug activity of a guest occurring inside the tenant's apartment. The court construed the lease term in light of section 1437d(*l*)(6) and Tennessee state contract law, and held that the statute permits a housing authority to evict a tenant for the drug activity of a guest "only if the tenant knew or should have known of the drug-related criminal activity and failed to take reasonable steps to halt or prevent the illegal activity." *Thompson*, 38 S.W.3d at 505.

Far from raising a conflict, this holding is in harmony with the Ninth Circuit's finding that section 1437d(*l*)(6) prohibits eviction of a tenant who "did not know of or have any reason to know of [drug] activity or took all reasonable steps to prevent the activity from occurring." HUD App. at 2a. Both courts agree that a tenant cannot be evicted for the alleged criminal activity of a guest without a finding of knowledge and control on the tenant's part. Consequently, future application of *Thompson* and *Rucker* on the issue of the eviction of a tenant for a guest's drug activity will in no way result in a "different treatment among similarly situated low income housing tenants" as OHA suggests. OHA Pet. at 12.

Petitioners' heavy dependence on *dicta* in *Thompson* does not create a conflict with *Rucker*. After overlooking the fact that *Rucker* and *Thompson* agree on the standard for eviction of a tenant in the guest context, Petitioners hope to establish a conflict by citing comments in *Thompson* that "strict liability" might apply in cases involving drug activity by a tenant's household member rather than a guest. Petitioners' citations are misplaced

because, as a plain reading of *Thompson* shows, these comments are pure *dicta*. The only issue before the Tennessee court was the application of the "one-strike" lease provision to criminal drug activity by a tenant's guest. As demonstrated, *Thompson's* holding on that issue is entirely consistent with *Rucker*. The issue of alleged drug possession by a household member was not before the Tennessee court, and its asides on a tenant's liability for household member drug activity – on which petitioners hang their assertion of a conflict – have no authority under Tennessee law. *See Shepherd Fleets, Inc. v. Opryland, U.S.A.*, 759 S.W.2d 914, 922 (Tenn. App. 1988) ("[c]ourt decisions must be read with special reference to the questions involved and necessary to be decided, and language used which is not decisive of the case . . . is not binding as precedent"); *Vinson v. Nashville, Chattanooga & St. Louis Ry.*, 321 S.W.2d 841, 845 (Tenn. App. 1958) ("a case is authority for the point decided, and nothing more"). The Tennessee court's dicta fails to support petitioners' writ request. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994) ("[i]t is to the holdings of our cases, rather than their dicta, that we must attend").

Petitioners' reliance on the Minnesota Supreme Court's decision in *Lor* is equally unavailing. *Lor* does not address at all the substantive issues in *Rucker*, and the issues that petitioners urge this Court to review, about whether and to what extent HUD's "one-strike" eviction policy accords with the meaning of and congressional intent in section 1437d(*l*)(6). Rather, the issue decided in *Lor* was whether a Minnesota state court has the equitable discretion to modify or overrule a decision by the PHA to evict a tenant because eviction would cause a severe

hardship. *Lor*, 591 N.W.2d at 702-703. The Minnesota court did not even mention, let alone analyze or decide, the statutory and constitutional issues on which the Ninth Circuit based the *Rucker* opinion. The opinion focussed only on the zones of equitable discretion between Minnesota state courts and the local federal housing authorities. *Lor* cannot be invoked as precedent for the proposition that petitioners assert and therefore presents no substantive conflict with the Ninth Circuit's findings in *Rucker*.

B. The *Rucker* Litigation Is Ongoing And Does Not Present A Final Resolution Of This Case On The Merits.

Rucker merely affirmed the grant of a preliminary injunction and allowed the underlying District Court case to proceed to final resolution. Although Petitioners try to slight the significant fact that the underlying litigation in *Rucker* is still at an early stage, this Court has repeatedly emphasized that, "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (holding in review of preliminary injunction decision that "[t]he decree that was sought to be reviewed by certiorari . . . was not a final one, a fact that *of itself alone furnished sufficient ground for the denial of the application*") (emphasis added); *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (declining to review a court of appeals decision that made final legal rulings but remanded for additional factual findings, noting that "because the Court of Appeals remanded the case, it is not yet ripe for

review by this Court.") Here, because the Ninth Circuit's opinion merely affirms a preliminary injunction, the case must now proceed before the district court for additional findings on the merits. That circumstance alone provides a sufficient basis for denying review of *Rucker*.

Petitioners' request for interlocutory review is particularly inappropriate because further proceedings in this case might resolve not only factual disputes but also significant legal issues affecting the very questions that petitioners urge the Court to resolve at this time. Contrary to HUD's assertion, the Ninth Circuit did not "definitively interpret[ ] Section 1437d(*l*)(6)." HUD Pet. at 29-30. *Rucker* does not even purport to address several key issues regarding the statute, including the allocation of the burden of proof under the "one-strike" lease provision and the showing of knowledge (if any) required in cases where drug activity occurs inside a tenant's apartment unit.[1] Given the substantive legal issues that remain

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[1] The issue of drugs allegedly within a HUD unit was not presented to the court of appeals. In issuing the preliminary injunction in this case, the district court made clear that its finding regarding section 1437d(*l*)(6) applied only where the drug activity "does not occur within the tenant's apartment unit." HUD App. at 165a-66a. The district court expressly declined to rule on what standard applies in circumstances where criminal activity occurs *inside* a tenant's apartment, *id.*, and the Ninth Circuit did not resolve that issue. The Ninth Circuit also expressly reserved the question whether the statute authorizes eviction if a tenant had knowledge of a household member's drug activity but could not realistically exercise control over it. "The district court's injunction does not address the issue of whether tenants who have knowledge of off-premises drug activities by household members may be evicted if they attempt in good faith to prevent their household

to be resolved regarding section 1437d(*l*)(6), *Rucker* does not present a final and comprehensive ruling on the statute that might be appropriate for review prior to final judgment. Rather, review at this time of the narrow findings in *Rucker* would result in piecemeal and inefficient consideration of the issues raised in this case related to the "one-strike" statute.

Petitioners' formulation of the questions presented for review improperly suggests that the Ninth Circuit resolved these and other important issues. OHA asks the Court to answer whether an "innocent owner *defense*" is available under the statute. OHA Pet. at (i) (emphasis added). HUD asks the Court to determine whether the statute applies "regardless of *whether it can be shown* that the tenant knew, or had reason to know, of the drug activity." HUD Pet. at (i) (emphasis added). These questions imply that the Ninth Circuit ruled on allocating the burden of proof under section 1437d(*l*)(6), when *Rucker* does not resolve that issue. Petitioners' questions also ignore the fact that *Rucker* leaves a host of issues open for the district court to consider and rule on as the underlying litigation moves forward. Those issues have not yet been resolved in this case, and the broad questions that petitioners present simply are not ripe for review in *Rucker*.

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members from engaging in such activity, but are unable to do so. Accordingly, we do not consider that question here." HUD App. at 28a, n.9. As the facts of this case are developed, the district court may well be required to resolve that legal question.

C. Petitioners' Enforcement Fears Are Sheer Speculation.

Petitioners' inflammatory suggestion that *Rucker* makes "the task of providing safe, decent and affordable housing to other tenants almost impossible," OHA Pet. at 13, *see also* HUD Pet. at 17-20, does not even remotely support certiorari. Petitioners hypothesize that *Rucker* will impose an "insurmountable" obstacle to eviction because housing authorities will rarely be able to prove a tenant's knowledge of drug activity. OHA Pet. at 12-13; HUD Pet. at 18-19. That speculation about the practical impact of *Rucker* relies on the false assumption that the decision definitively placed the burden on housing authorities to affirmatively prove a tenant's knowledge of drug activity. HUD Pet. at 18-19, OHA Pet. at 12-13. In fact, as noted above, the Ninth Circuit's opinion does not allocate the burden of proof in a "one-strike" eviction but simply holds that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." HUD App. at 26a. HUD concedes the absence of a definitive ruling of *Rucker* on the issue by stating that the Ninth Circuit fails to "discuss[ ] any issues concerning the allocation of the burden-of-proof." HUD Pet. at 13. Petitioners' parade of horribles is pure speculation without any grounding in *Rucker*.

Contrary to petitioners' musings, *Rucker* strengthens public housing by creating an extraordinary incentive for a tenant to exercise *all reasonable efforts* to prevent the

drug activity of their household members and guests. HUD App. at 26a. The Ninth Circuit's holding expressly applies only "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring." *Id.* Consequently, the Ninth Circuit's findings are fully consistent with the goals underlying section 1437d(*l*)(6).

D. Petitioners' Claim Of Error Does Not Support A Grant Of Review.

Petitioners' attack on the merits of *Rucker* also fails to warrant a grant of certiorari. "[T]his Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (J. Stevens, concurring); *see also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("this Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). Thus, petitioners' various quarrels with the Ninth Circuit's legal findings are irrelevant to this Court's consideration of petitioners' request for review.

Petitioners' attacks are also unfounded. In deciding the issues in this case, the Ninth Circuit properly applied the framework for analysis set out by this Court in *Chevron U.S.A. Inc. v. Nat'l Resource Defense Council*, 467 U.S. 837 (1984), and arrived at conclusions that are wholly consistent with this Court's established precedents. While Petitioners disagree with the Ninth Circuit's conclusions, litigants' disappointed expectations are not a basis for certiorari.

II. THE LOWER FEDERAL COURTS SHOULD ACT BEFORE THIS COURT INTERVENES

The scant record of lower federal court decisions on the government's application of section 1437d(*l*)(6) should count as a significant final factor against a grant of certiorari. The issues arising out of the government's practices should be allowed to percolate below to determine whether federal courts reach uniformity or conflict in interpreting section 1437d(*l*)(6) and to permit the lower courts to resolve questions left open by *Rucker*. Additional decisions interpreting and applying the statute will significantly contribute to determining whether to and to what extent this Court should act.

CONCLUSION

As Petitioners' own arguments suggest, the ultimate application and interpretation of section 1437d(*l*)(6) will depend upon the resolution of a myriad of fact issues left unresolved by the preliminary injunction affirmed in *Rucker*. For the reasons stated herein, *Rucker* is an inappropriate vehicle for this Court to address any of the purported claims raised by Petitioners. Consequently,

Respondents respectfully submit that the petitions for writ of certiorari of HUD and OHA should be denied.

Respectfully submitted

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